

1. What is the Legal Definition?

Harassment becomes illegal when an employer, supervisor or co-worker harasses a person because of their race, color, creed, ancestry, national origin, age (40 and up), disability, sex, arrest or conviction record, marital status, sexual orientation or membership in the military reserve.

Harassment may include verbal abuse, epithets, and vulgar or derogatory language, display of offensive cartoons or materials, mimicry, lewd or offensive gestures and telling of jokes offensive to the above protected class members. The behavior must be more than a few isolated incidents or casual comments. It involves a pattern of abusive and degrading conduct directed against a protected class member that is sufficient to interfere with their work or create an offensive and hostile work environment.

"Sexual" harassment includes unwelcome sexual advances, requests for sexual favors and verbal or physical conduct of a sexual nature when:

1. Submission to such conduct is made an implicit or explicit term or condition of employment

Example:

A newly hired machine operator is told sexual jokes, touching and nude posters are just part of factory life and she should try to ignore it.

2. Submission to or rejection of such conduct is used as the basis for an employment decision affecting an Employee

Example:

A manager told a worker applying for a promotion that the job would be hers if she just "treated him right".

3. The conduct interferes with an employee's work or creates an intimidating, hostile or offensive work environment.

Example:

A worker was subject to repeated advances from a co-worker asking her for dates and to go out for a drink after work. She said she wasn't interested, but he persisted.

2. When is conduct unwelcome?

Conduct is unwelcome when an employee does not solicit or incite it and when the employee regards the conduct as undesirable or offensive. Since sexual attraction is a normal factor in employee interactions, the distinction between advances that are invited, uninvited-but-welcome, offensive-but-tolerated and flatly rejected may be difficult to discern. This distinction is important because conduct is unlawful when it is unwelcome.

It is important to note that harassment is in the "eye of the beholder". What might be acceptable to one worker might be offensive and unwelcome to another. The U.S. Supreme Court has adopted the "reasonable person" standard in determining if conduct is harassing.

3. What forms does sexual harassment take?

In practical terms, there are two forms of sexual harassment.

Quid Pro Quo (ThisforThat): When employment decisions or expectations (e.g. hiring, promotions, salary increases, shift or work assignments, and performance standards) are based on an employee's willingness to grant or deny sexual favors. Examples of quid pro quo:

- Demanding sexual favors for a promotion or raise.
- Disciplining or firing a subordinate whom ends a romance.
- Changing work standards after a subordinate refuses repeated requests for a date.

Hostile Environment: A work environment is “hostile” when unwelcome verbal, non-verbal or physical behavior focusing on sexuality is severe and pervasive enough to interfere with the victim’s work performance or be intimidating or offensive to a reasonable person.

Examples of behaviors that can create a hostile environment:

Verbal

- Sexual jokes or insults
- Comments about a person’s body or sex life
- Sexually demeaning comments

Non-Verbal

- Gestures and staring
- Display of sexually suggestive or degrading materials
- Giving sexually suggestive “gifts”.

Physical

- Touching, hugging, kissing or patting
- Brushing against a person’s body
- Blocking a person’s movement

4. Important Facts about Harassment

- Sexual harassment generally occurs when there is a disparity of power, not just when men and women work together.
- A victim does not have to suffer economically before harassment can be found.
- A person who consents to a supervisor’s sexual advances might still be a victim of sexual harassment.
- Offenders can be supervisors, co-workers, or non-employees such as vendors, customers, or suppliers.
- The victim does not have to be directly involved. A third person can be offended by harassing behavior among willing participants.
- Harassment does not have to be reported or complained about by the victim to be defined as harassment.
- An employer can set stricter limits on harassment in the workplace than may be specified under fair employment laws.
- Unless severe, a single incident or a few isolated incidents of offensive behavior will not likely rise to the level of harassment.
- A single incident of unwanted touching of a person’s intimate body areas is sufficiently offensive to be defined as sexual harassment. It may also constitute a criminal offense under state “sexual assault” laws.
- Both the individual harasser and the employer may be found personally liable for damages related to their involvement in harassing behavior.
- Non-sexual, abusive, hostile, or rude treatment of one gender may still constitute harassment, despite the absence of overt sexual advances.

5. How can management respond to harassment concerns?

- Implement a strong policy explicitly prohibiting harassment, including disciplinary consequences that will be applied.
- Include a ‘victim-friendly’ complaint procedure that encourages employees to come forward, is sensitive to their situation, stresses the need for confidentiality and ensures that no retaliation will occur regardless of the outcome of an investigation
- Ensure that every complaint is taken seriously. It is essential that the employer act in a timely manner. Commence an investigation immediately and take appropriate corrective action **as soon as possible**.
- Avoid making credibility judgments reaching conclusions before you’ve gathered the facts, even if you think you “know” the parties involved and have an “idea” about what happened.
- Keep in mind that there is a wide range of sensitivity toward harassing behavior. Remember, the “eye of the beholder” is what is important, not is what you or other co-workers might find personally offensive. And be aware that it is not just young, “attractive” females who are sexually harassed.
- Provide training to sensitize employees on the issue of harassment and periodically remind them of your strong desire to maintain a harassment free workplace.

- Keep lines of communication open. Make sure the complainant is informed of your efforts to correct any harassing behavior and of your desire to be promptly notified if problems persist or if retaliation occurs.
- Realize that as a supervisor or owner you are “at risk” anytime you have an intimate relationship with a subordinate, even though your present relationship is not harassing and may not affect employment decisions.

6. Who is liable for harassment?

How an employer addresses harassment with its employees is likely to be the single most critical issue in determining liability in legal actions.

- An employer is responsible for **its own acts** and those of **its agents** regardless of whether the acts were authorized or even forbidden by the employer and regardless of whether the employer knew or should have known of those acts.
- Regarding conduct between **co-workers**, an employer is responsible for harassment if the employer or its agents **knew or should have known** of the conduct and failed to take immediate and appropriate corrective action.
- Regarding non-employees such as customers or suppliers, an employer is responsible for harassment of employees in the workplace, where the employer or its agents knew or should have known of the conduct and failed to take immediate and appropriate action.

7. What are the Consequences?

Lost Work Time:

- Harassment is very disruptive of production.
- It can seriously affect victim/employee morale.
- It may increase absenteeism and turnover.

Reputation:

- An owner or company's community reputation may suffer.

Damages:

- Both harasser and employer may be personally liable.
- A victim's back pay; attorney fees and costs may be substantial.
- Compensatory and punitive damages under federal law may dramatically increase dollar damages.
- Other laws, such as state sexual assault statutes, may result in criminal charges.

8. When in doubt about Sexual Harassment!!

Often, an employee or supervisor may not be sure if a particular behavior or interaction is appropriate. The following “not sure” tests might be helpful.

Ask yourself –

- Would you say or do it in front of your spouse, parent, or close friend?
- How would you feel if your spouse, daughter, sister, mother, or close friends were subjected to the same words or behavior?
- Would you say or do it to a colleague who is the same sex as you?

This is one of a series of pamphlets highlighting programs of the Wisconsin Department of Workforce Development. It is intended to provide only a general description, not a legal interpretation.

The Equal Rights Division also has additional informational material that explains various aspects of the state laws prohibiting employment discrimination

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Questions about employment discrimination should be directed to the

EQUAL RIGHTS DIVISION

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